United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2009

TO BE ARGUED BY:
ALLEN M. KRANZ

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA ex rel Vincent Caputo,

Relator-Appellant

- against -

ROBERT J. HENDERSON, Superintendent Auburn Correctional Facility,

Respondent-Appellee

- -x

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P/S

DOCKET NO. 76-2009

On Appeal from the United States District Court

for the Eastern District of New York

BRIEF FOR RELATOR-APPELLANT

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BRIEF FOR RELATOR-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order dismissing a petition for a Writ of Habeas Corpus, entered on December 22, 1975 by the Honorable Jack B. Weinstein, United States District Judge, Eastern District of New York. The order and opinion are unreported and appear at page A-50 of the Appendix.

In the District Court, the relator-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, New York, who is continuing to represent the relator-appellant in this Court.

THE OPINION AND ORDER BELOW

On December 22, 1975, the United States District Court for the Eastern District of New York (Weinstein, J.) entered an order dismissing the petition.

In dismissing the petition, the Court found that appellant would have pleaded guilty inrrespective of errors made by the trial court at the time appellant entered his plea, and that accordingly, the errors had no impact on the plea (see Appendix, p. A-50).

THE ISSUE PRESENTED

1. Was the appellant's plea of guilty voluntarily and understandingly entered?

STATEMENT OF THE CASE

On November 20, 1972, appellant was convicted in County Court, Nassau County (Young, J.) after a plea of guilty to attempted burglary in the third degree and was sentenced to an indeterminate term of imprisonment with a maximum of four years. By order of March 11, 1974, the New York State Supreme Court, Appellate Division, Second Department affirmed relator's conviction, Justice J. Irwin Shapiro dissenting and voting to reverse in a memorandum opinion. People v. Caputo, 44 A.D.2d 572 (2nd Dept., 1974). Thereafter, by order dated February 12, 1975, the New York State Court of Appeals affirmed relator's conviction in a memorandum opinion. People v. Caputo, 36 N.Y.2d 653 (1975).

Pursuant to the suggestion of the New York State Court of Appeals, the appellant brought a motion to vacate judgment in the County Court of Nassau County alleging that his plea of guilty was not voluntarily and understandingly entered. By order dated June 10, 1975, the County Court of Nassau County denied the motion. The New York State Supreme Court, Appellate Division, Second Department denied appellant's motion for leave to appeal to that Court from the adverse decision in the Nassau County Court on July 16, 1975.

The appellant then brought a petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District, in which he contended that his guilty plea was not voluntarily and understandingly entered (United States ex rel Vincent Caputo v. Robert J. Henderson, Superintendent, Auburn Correctional Facility, 75-C-1614). The petition was denied by an order dated December 22, 1975. On January 22, 1976, the Hon. Jack B. Weinstein signed an order granting appellant a Certificate of Probable Cause for appeal to this Court.

STATEMENT OF FACTS

On October 11, 1972, appellant appeared in County Court, Nassau County, withdrew his previously entered plea of not guilty to the charges of burglary in the third degree, criminal possession of stolen property in the second degree and possession of burglar's tools under indictment number 34651, and entered a plea of guilty to attempted burglary in the third degree in full satisfaction of the indictment (A-19).*

Prior to accepting the appellant's application to change his plea, the Court informed him of the sentences he might receive:

> THE COURT: All right. Now, a conviction, of course, carries with it other possibilities, the possibility of sentence, and I will tell you what the possibilities are here. First let me say that I am informed that you have been examined and reported to be addicted to narcotics or dangerous drugs, and you will have the right, at the time of sentence, to admit your addiction or to deny your addiction or to stand mute, if you prefer.
>
> If you stand mute or you deny your addicition, then you will have the right to have a jury trial or a trial without a jury on the issue.
>
> If you are found to be an addict, then there is a possibility of a sentence to the Narcotics Addiction Control Commission for an indeterminate term

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* Numbers in parentheses refer to page numbers of the appendix.

up to 60 months.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: On the other hand, there is no requirement that you be sent there, but there is the possibility of a sentence under the Penal Law, instead of the Menal Hygiene Law; and I will tell you what those possibilities of sentence are.

There is a possibility of a sentence to a state prison for an indeterminate term, up to four years, a possibility of sentence to a County Jail for up to one year, the possibility of probation for a period of up to five years, a conditional discharge, and there is also a possibility of an unconditional discharge (A-14) (Emphasis added).

At sentencing on November 20, 1972, the appellant admitted his addiction to drugs and accordingly the Court found him to be a narcotic addict pursuant to the Mental Hygiene Law (A-21).

The Court sentenced the appellant to an indeterminate sentence of imprisonment with a maximum term of four years (A-22).

POINT ONE

APPELLANT'S GUILTY PLEA WAS NOT VOLUNTARILY AND UNDERSTANDINGLY ENTERED

On October 11, 1972, the appellant appeared in County Court, Nassau County, withdrew his plea of not guilty, and entered a plea of guilty to a class E felony (A-16).* Prior to accepting appellant's change of plea, the Court informed him that by so pleading, he would be giving up his right to trial by jury, the right to confront his accusers, and his privilege against self-incrimination (A-11). The trial court went on to inform the appellant of the various sentencing alternatives open to the Court:

> THE COURT: All right. Now, a conviction, of course, carries with it other possibilities, the possibility of sentence, and I will tell you what the possibilities are here. First, let me say that I am informed that you have been examined and reported to be addicted to narcotics or dangerous drugs, and you will have the right, at the time of sentence, to admit your addiction or to deny your addiction or to stand mute, if you prefer.
>
> If you stand mute or your deny your addiction, then you will have the right to have a jury trial or a trial without a jury on the issue. If you are found to be an addict, then there is a possibility of a sentence to the Narcotics Addiction Control Commission for an indeterminate term up to 60 months.
>
> Do you understand that?

*Numbers in parentheses refer to page numbers of the appendix

THE DEFENDANT: Yes.

THE COURT: On the other hand, there is no requirement that you be sent there, but there is the possibility of a sentence under the Penal Law, instead of the Mental Hygiene Law, and I will tell you what those possibilities of sentence are.

There is a possibility of a sentence to a State prison for an indeterminate term up to four years, a possibility of sentence to a County Jail for up to one year, the possibility of probation for a period of up to five years, a conditional discharge, and there is also a possibility of an unconditional discharge (A-13, 14) (Emphasis added).

At sentence, on November 20, 1972, the appellant admitted his addiction to drugs (A-21).

Former Mental Hygiene Law Section 81.21[1] provides in part:

(d) 2. Where sentence is to be imposed for a felony, the Court, in its discretion, may either impose an indeterminate sentence to an institution under the jurisdiction of the State Department of Correction in accordance with the provisions of the revised penal law applicable to sentencing for such felony (except as otherwise provided in subdivision (e) of this section), or certify such defendant to the care and custody of the commission for an indefinite period, which shall commence on the date the order of certification is made and shall terminate the first to occur of the discharge of such defendant by the commission as rehabilitated or the expiration of a period of 60 months from the date such period commenced.

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1. The thrust of former Mental Hygiene Law §81.21 is now contained in both present Mental Hygiene Law §81.21 and Penal Law §60.03.

> (c)...In no case to which subdivision (d) of this section is applicable shall the Court suspend sentence, the execution thereof, or impose a sentence other than that specified in subdivision (d) of this section. (Emphasis added)

Accordingly, when Mr. Caputo admitted his addiction to narcotic drugs prior to being sentenced for a class E felony, there were but two alternatives open to the Court, i.e., imposition of an indeterminate sentence to a state correctional facility, or certification to the Commission. The Court was not authorized to sentence him to the County Jail, nor could he receive probation, conditional discharge, or unconditional discharge.

As previously indicated, the trial court informed appellant that these less severe Penal Law sanctions were available to defendants who admit narcotic addiction subsequent to a plea of guilty to a felony charge. (Emphasis added).

Such misinformation constituted a material misrepresentation and prevented the making of a voluntary and understanding plea within the meaning of the Due Process Clause of the United States Constitution.

(A) A Guilty Plea Is Not Voluntary And Understanding Unless Defendant Knows The Consequences of His Plea

A guilty plea by a defendant is an admission of all the elements of a criminal charge. With respect to a state conviction on a guilty plea, there is reversible

error under the due process clause of the Fourteenth Amendment where the record does not affirmatively disclose that the defendant voluntarily and understandingly entered such plea. Brady v. United States, 397 U.S. 742 (1970); Boykin v. Alabama, 395 U.S. 238 (1969).

The constitutional requirement that guilty pleas must be voluntarily and intelligently entered is a well-established concept. E.g. Machibroda v. United States, 360 U.S. 487, 493; Kercheval v. United States, 274 U.S. 220, 223. However, the United States Supreme Court, in Boykin, supra, added a new requirement that the record must affirmatively show the voluntary and understanding nature of the plea. Brady v. United States, supra at 747 n. 4 (Emphasis added). Speaking of what such disclosure must reveal, the Brady Court stated that "Waiver's of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." 397 U.S. at 748.

In the Federal Courts, the judge can not accept a guilty plea without first addressing the defendant personally and determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea. Federal rules of Criminal Procedure, Rule 11, 28 U.S.C.A. The judge must perform the function of addressing the defendant, regardless of

whether defendant is represented by counsel. A failure to do so is error, and a defendant, as a matter of right, may withdraw his plea, even though the prosecution attempts to show that the defendant understood the charges and consequences of his plea. McCarthy v. United States, 394 U.S. 459 (1969).

While Rule 11 of the Federal Rules is applicable only to Federal cases, it restates what the United States Supreme Court and the lower Federal Courts have held to be the requirements of due process of law, i.e. that a guilty plea must be entered voluntarily with knowledge of the nature of the charges and the consequences of the plea. E.g. Boykin v. Alabama, supra; McCarthy v. United States, supra; United States ex rel Leeson v. Damon: 496 F.2d 718 (2nd Cir., 1974); Katz v. United States, 353 F.2d 312 (8th Cir., 1965); Matthews v. United States, 308 F. Supp. 456 (S.D.N.Y., 1969). A state or federal conviction based on a guilty plea that does not meet these standards violates due process of law.

In United States ex rel Leeson v. Damon, supra, this Court reaffirmed the proposition that a defendant who pleads guilty to a charge must do so with a full understanding of the consequences of such plea. Petitioner Leeson came into the Federal Courts after exhausting his state remedies in an attempt to have his state guilty plea overturned. This Court held that where a state hearing to determine whether a defendant could withdraw a guilty plea prior to sentencing

revealed that such plea was entered without knowledge as to the maximum sentence defendant might receive, the plea was entered in ignorance of its direct consequences and invalid as not being knowingly and understandingly made. (Emphasis added).

While Leeson speaks only in terms of misinformation regarding the maximum sentence available, United States ex rel Hill v. Termullo, 510 F.2d 844 (2nd Cir., 1975) clearly mandates similar relief where the erroneous belief concerns a statutory minimum. Accord, United States ex rel Rosner v. Warden, 520 F.2d 1206 (2nd Cir., 1975).

(B) The Record Clearly Establishes That Appellant Was Not Aware Of The Consequences Of His Plea

In the instant case, appellant was misinformed of the sentencing alternatives available upon his plea of guilty. Although affirming on other grounds, the New York State Court of Appeals did not dispute the fact that the alleged inaccuracies were present (see Memorandum Opinion of Court of Appeals, A-3). Furthermore, in reviewing appellant's motion to vacate judgment, Judge Young, of the Nassau County Court (the original sentencing judge), found that no factual dispute existed (see Decision of Motion to Vacate Judgment, A-4). Despite this apparent factual concession, the ultimate decision in Nassau County Court was unfavorable as the Court took the rather tenuous position that since Mr. Caputo was not as yet adjudged an addict at change of plea proceedings,

all the specified sentencing alternatives were available in a "literal" sense. Such reasoning is clearly fallacious since the Court specifically told appellant that these alternatives would be available if he choose to admit addiction. (Emphasis added).

While the duty of the state Court to inform a defendant of the permissible range of sentences has not been definitely decided, the Court did so in the instant case, and the information was inaccurate. Certainly, if a court chooses to dispense information to a defendant, that defendant is justified in accepting the veracity of such information to the same extent that he would be justified in relying on an informed counsel.

The State Court proceedings, conclusive in establishing that misrepresentations were in fact made, therefore provided a trial court record that could not affirmatively disclose a voluntary and understanding plea. See Brady v. United States, supra; Boykin v. Alabama, supra.

In United States v. Megura, 394 F. Supp. 246, 247 (D. Conn., 1975), the Court concluded that while state convictions could be vacated on direct review for Boykin-type violations, those convictions will not be "summarily vacated on collateral attack." See United States ex rel Hill v. Ternullo, supra. Such proceedings should instead be resolved by holding an evidentiary hearing to determine if the plea is voluntary "as a matter of fact." 394 F. Supp. at 247. See also, Todd v. Lockhart, 490 F.2d 626

(8th Cir., 1974); Walker v. Caldwell, 476 F.2d 213, 215 n. 1 (5th Cir., 1973). In the instant case, upon moving for a Writ of Habeas Corpus, appellant's allegation that he was not fully aware of sentencing alternatives when he entered his guilty plea was put to such a test.

On December 5, 1976, while testifying on his own behalf, appellant stated that during the time he was in Nassau County Court on October 11, 1972, he was hoping to get a definite sentence of one year as a result of the disposition of the charges in question (A-28, 36-37). Appellant further testified that when he heard the sentencing alternatives posed by the Court, he believed that all of these alternatives were viable if he chose to plead guilty to attempted burglary and admit his addiction to drugs (A-28). In addition, Mr. Caputo recalled that at no time did anyone inform him that all the alternatives were in fact not available, as a result of which he had no reason to believe them incorrect (A-28).

The cross-examination of appellant failed to establish any basis whatsoever upon which to disbelieve the above assertions. Mr. Caputo was asked to recall various questions put to him by the Court on October 11, 1972 and his responses to them. Appellant recalled: (1) telling the Court he had an opportunity to carefully think over and discuss with his lawyer the entry of a guilty plea; (2) stating that he felt it was in best

interest to plead guilty, and; (3) that nobody had threatened or forced him to enter a guilty plea (A-33). These responses fail to undermine the truth of appellant's contention that he was unaware of the sentencing alternatives available for at least two rather significant reasons. Initially, these questions and responses took place, chronologically, after the Court had already made the misrepresentations as to sentencing possibilities (see A-14 to 16); and secondly, redirect examination revealed that at the time this questioning took place, Mr. Caputo still believed that a one year jail term was available (A-13 to 14).

Likewise, the testimony of appellant's trial counsel, Paul Wershals, in no way disputed Mr. Caputo's assertions and, in fact, supplied additional proof of their veracity. Wershals recalled that at no time did he ever tell appellant that he couldn't get one year in the county jail, conditional or unconditional discharge, or probation if he pled guilty to attempted burglary (A-38). Regarding appellant's hopes of getting a one year definite sentence, counsel could not actually recall whether he told Caputo it was, in fact, a viable sentencing alternative but stated that it was an actual possibility that he had (A-38). Asked why he did not inform appellant that the Court was in error with regard

to stated sentencing alternatives, Wershals candidly admitted that he was not aware that an error had been made, i.e. he relied on the Court's representations (A-39). Counsel further testified that he was not aware of anyone else advising appellant that the Court was in error in its statement of available sentencing alternatives (A-39).

As no evidence has ever been offered to refute appellant's contention, the entire record of the prior proceedings had in the instant case clearly demonstrates that appellant was unaware of the correct sentencing alternatives available when he entered his plea of guilty (see Todd v. Lockhart, supra), and that such mistaken belief was "reasonably justified." See United States ex rel Curtis v. Zelker, 466 F.2d 1092, 1098 (2d Cir., 1972) Cert. denied 410 U.S. 945.

(C) The District Court's Finding, Even If Correct, Is Not Determinitive Of The Case

Subsequent to a hearing on appellant's application for a Writ of Habeas Corpus, the District Court (Weinstein, J.), in denying the relief requested, made the following finding:

> THE COURT: I find on the basis of the evidence before me that the defendant would have pleaded in any event exactly as he did. Whatever the judge told him about alternatives, and the error of the Court, therefore, is proposing alternatives that were not, in fact, available, had no impact at all on the plea.
>
> Under the circumstances, this must be denied. (A-50).

Appellant contends that this finding, even if correct, is not dispositive of the instant case.[2]

The finding of the District Court, while concluding that appellant would have entered a plea of guilty despite the misrepresentations made, can in no way be said to imply that Mr. Caputo was aware of the actual sentencing alternatives available when he entered his plea. On the contrary, the record is conclusive in establishing that he was not aware [See sub. (B)], and accordingly, if any implication is to be drawn from the Court's findings, it would have to be to that effect. The Court may very well have concluded this additional finding to be unnecessary since relief was to be denied on the ground set forth above. If so, that

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2. Appellant in no way concedes that the District Court findings are correct. On the contrary, the evidence adduced, while possibly establishing that it was in appellant's best interest to enter a plea of guilty, as the people apparently had a very strong case (see A-49 to 50), failed to establish sufficient basis for the finding that was, in fact, made. As such, it is contended the finding is clearly erroneous. See Fed. Rules Civ. Proc. rule 52 (a), 28 U.S.C.A.; United States ex rel Sostre v. Festa, 513 F.2d 1313 (2nd Cir., 1975). While still requesting that this Court review the finding, no separate point has been devoted since the evidentiary hearing in the District Court was quite short and the thrust of appellant's argument is that the finding is not determinative of the case.

conclusion was incorrect.

A defendant who pleads guilty must be aware of the consequences of his plea [See Sub. (A)]. As applied to sentencing alternatives, be they statutory maximums or minimums, this most basic requirement has not varied, and remains as an essential element of every plea. E.g. United States ex rel Leeson v. Damon, supra; United States ex rel Hill v. Termullo, supra; United States ex rel Rossner v. Warden, supra.

> ...[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty pleas is an admission of all the elements of a formal criminal charge, it can not be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. McCarthy v. United States, supra at 466 (footnotes admitted).

In United States ex rel Leeson v. Damon, supra, this Court found a plea entered in ignorance of its direct consequences to be invalid without qualification. Having ascertained that state remedies had been adequately exhausted, the inquiry was limited to whether appellant knew the consequences of his plea, and rightly so. As the government had conceded that Leeson was not aware of the maximum sentence he might receive, no further evidentiary proceeding was necessary and appellant prevailed:

> ...[A]ppellant's plea was not knowing and was without an understanding of the law inasmuch as he he did not know the maximum possible sentence he might receive. It is thus a plea entered in ignorance of its direct consequences, and it is therefore invalid. 496 F.2d ct. 721 (Citations Ommitted).

In United States ex rel Hill v. Ternullo, supra, this Court, in finding misinformation about minimum sentencing alternatives to be as significant as inaccurate knowledge of maximums, mandated the same relief as it had in Leeson. While the government's concession had obviated the necessity for obtaining further evidence in Leeson, Hill was remanded to the District Court with specific instructions, again limiting the inquiry to whether appellant possessed the requisite knowledge:

> If it finds that the petitioner's plea was made without understanding of the minimum or maximum sentence possibilities, the District Court must issue the Writ or grant other appropriate relief... 510 F.2d at 847 (Citations Omitted).

The instant case falls squarely within the rule of law enunciated in the above cited cases, and accordingly should have been dealt with similarly at the District Court level. While a finding that appellant was aware of the correct sentencing alternatives as a matter of fact would render any trial court misrep-

resentations harmless, Domenica v. United States, 292 F.2d 483 (1st Cir., 1961), the finding made by the District Court in the case at bar does not as it bypasses the sole question to be determined.[3]

While the ultimate burden may be on the Habeas petitioner to establish by a preponderance of the

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3. Respondent's affidavit in opposition to appellant's Writ of Habeas Corpus contended that he had failed to show the requisite reliance on the Court's misrepresentations to obtain the relief requested. While the affidavit of appellant in his moving papers asserted reliance in a conclusory fashion, evidence adduced at the hearing held on the Writ clearly established that appellant believed the court's representations as to sentencing alternatives, and that the inaccuracies were not corrected by his attorney or anyone else prior to the entry of his guilty plea [See memorandum opinion of the New York State Court of Appeals (A-3)]. Although a specific degree of reliance was required to relieve an appellant from a guilty plea in United States v. Podell, 519 F.2d 144 (2nd Cir., 1975), Cert. denied _____ U.S. _____, that case applies only to the government's failure to fulfill a promise or agreement and its holding was constrained by the previously determined standard imposed by the United States Supreme Court in Santobello v. New York, 404 U.S. 257. Furthermore, that issue does not deal specifically with direct consequences, i.e. that which is ultimately knowable, since a court is not obliged to follow a prosecutor's recommendation. cf. United States ex rel Hill v. Ternullo, 510 F.2d 844, 847 (2nd Cir., 1975).

evidence that his plea was not voluntarily and understandingly entered, United States ex rel Curtis v. Zelker, supra, the government must come forward with an affirmative showing when prima facie error exists. Todd v. Lockhart, supra. As the record prior to the District Court proceedings disclosed facts from which it could be determined that appellant was not aware of the minimum sentencing alternatives available (i.e. prima facie error was established), and evidence offered at the hearing conclusively established such to be true, the government was required to come forward and show that appellant was, in fact, aware of the correct sentencing alternatives. As the hearing testimony clearly indicates that they did not [See Sub. (B)], appellant should have been granted the relief requested.

CONCLUSION

FOR THE ABOVE STATED REASONS THIS COURT SHOULD REVERSE THE ORDER OF THE DISTRICT COURT DISMISSING THE PETITION FOR A WRIT OF HABEAS CORPUS

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